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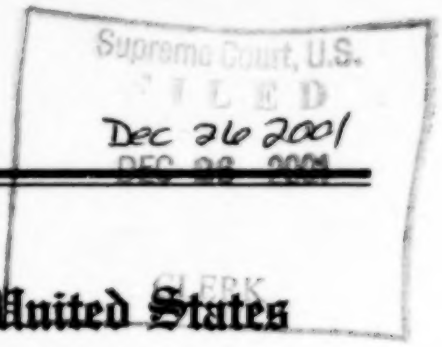

No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A. INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* FOR THE AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, THE WESTERN OCCUPATIONAL AND ENVIRONMENTAL MEDICAL ASSOCIATION, AND THE CALIFORNIA SOCIETY OF INDUSTRIAL MEDICINE AND SURGERY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person's own health or life is a "qualified individual" who satisfies "qualification standards" for that job within the meaning of the Americans with Disabilities Act.

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Other Authorities:

ACOEM Code of Ethical Conduct, http://www.acoem.org/code/code.htm. 6, 9, 10

American Medical Association, Code of Medical Ethics: Current Opinions, E-10.03 Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations, http://www.ama-assn. org/ama/pub/category/2503.html. 9

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INTEREST OF THE AMICI CURIAE[1]

The American College of Occupational and Environmental Medicine is the nation's largest medical society dedicated to promoting the health of workers through preventive medicine, clinical care, research, and education. It was founded in 1916 and represents over 6,000 physicians specializing in the field of occupational and environmental medicine. ACOEM members are trained in treating job-related diseases, recognizing and resolving workplace hazards, instituting rehabilitation methods, and providing well-managed care.

The Western Occupational and Environmental Medical Association represents physicians specializing in occupational and environmental medicine in California, Arizona, Nevada, Utah, and Hawaii. It was founded in 1941. Its mission is to be a resource to and represent members in the profession and practice of occupational and environmental medicine and to enhance their efforts to promote and improve health in the workplace and the community. WOEMA is a component society of ACOEM.

The California Society of Industrial Medicine and Surgery represents California physicians who treat and evaluate industrial injury patients. It was organized in 1980 to promote the highest standards of professional service in the field of industrial medicine and surgery; to increase public awareness of the role of medicine in the workers'

1. The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to its preparation and submission.

compensation system; to promote health and safety; to provide continuing education in the field of industrial medicine and to set standards of professional conduct for those in the system.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling that the Americans with Disabilities Act requires employers to employ persons whose medical condition creates a significant risk that they will be seriously injured or killed on the job is erroneous. It flies in the face of long-standing public and private policy in favor of protecting worker health, including a policy of protecting workers from risks to themselves from their own medical conditions. Congress has enacted numerous laws to prevent workplace injury and illness, and the occupational medicine profession has played an important role in giving effect to those laws. Workplace injuries and illnesses — and the devastation they cause to all concerned — have been significantly reduced in recent years. The Ninth Circuit's erroneous interpretation of the ADA undermines this progress and should be rejected.

Allowing employers to rely on the medical judgments of occupational medicine physicians is fully consistent with the principles of the ADA. Employers who exclude workers based on a medical diagnosis that employment would seriously injure or kill the worker are not engaging in discrimination based on stereotypic assumptions or prejudices against which the ADA is directed. Rather, they are acting on the basis of expert advice of trained professionals who are ethically bound to protect worker health and render opinions based on sound medical and scientific principles.

For the same reason, employers should not be subjected to suits under the ADA based on after-the-fact efforts to dispute in court the validity of the reasonable medical opinions available at the time the employment decision was made. Proper reliance on facially reasonable opinions rendered by trained physicians does not become unlawful discrimination merely because allegedly conflicting opinions are later produced.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH FUNDAMENTAL PUBLIC AND PRIVATE POLICY IN FAVOR OF PROTECTING THE HEALTH AND SAFETY OF WORKERS.

The health and safety of workers has long been a concern of both law and medicine. According to the federal Bureau of Labor Statistics, 5.7 million injuries and illnesses were reported in private industry workplaces in just the year 2000 alone. This was an incidence rate of 6.1 cases per 100 equivalent full-time workers. Nearly half of these incidents required recuperation away from work, restricted duties at work, or both. *See* "Workplace Injuries and Illnesses in 2000," *News*, Bureau of Labor Statistics, Department of Labor (Dec. 18, 2001), http://stats.bls.gov/iif/oshwc/osh/os/osnr0013.pdf. The federal government reports that each day an average of 9,000 workers in this country sustain disabling injuries on the job, 16 workers die from an injury sustained at work, and 137 workers die from work-related diseases. *See* http://www.cdc.gov/niosh/about.html.

As a leading medical journal has noted, the effects of workplace injury and illness are devastating:

> Occupational illness, injuries, and deaths are costly events, responsible for direct medical costs; for indirect costs resulting from lost production, postponed opportunities and diminished investment; and for noneconomic costs, resulting from pain and suffering, disrupted careers, and devastated families.

Linda Rosenstock, et al., *Occupational and Environmental Medicine: Meeting the Growing Need for Clinical Services*, 325 New England J. of Med. 924, 924 (Sept. 26, 1991).

To reduce workplace injury and illness, Congress enacted in 1970 the Occupational Safety and Health Act. 29 U.S.C. § 651, *et seq*. This statute reflects the nation's fundamental interest in protecting the health and safety of workers. The stated purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.* § 651(b). Among other things, Congress acted to assure "insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience." *Id.* § 651(b)(7). To accomplish this, the Act requires that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1). The Act also requires the Occupational Safety and Health Administration ("OSHA") to promulgate occupational safety and health standards to protect worker health. *Id.* §§ 654(a)(2), 655.

In compliance with this mandate, OSHA has promulgated numerous standards to protect workers from threats to their own health from workplace conditions, including requirements that workers medically diagnosed with certain conditions be removed from areas where substances injurious to their health are present. *See, e.g.*, 29 C.F.R. § 1910.1028(i)(8) (medical removal to prevent exposure to benzene); *id.* § 1910.1025(k) (medical removal to prevent exposure to lead).

As part of the Act, Congress also created the National Institute for Occupational Safety and Health ("NIOSH"). 29 U.S.C. § 671. Its statutory charge is to conduct research and experimental programs to improve occupational health and safety and to make recommendations for new or improved health and safety standards. *Id.* § 671(d). To fulfill this charge, NIOSH has prepared and released literally hundreds of publications related to occupational health and safety issues, including research studies, information on occupational illnesses and injuries, training materials and guidelines for prevention and treatment.

One of the illnesses NIOSH has addressed is Hepatitis C (HCV), the disease contracted by the plaintiff in this case. *See* http://www.cdc.gov/niosh/bbppg.html. HCV is the most common bloodborne infection in the United States. Persons infected with HCV are at risk for chronic liver disease, the tenth leading cause of death in the United States. The Centers for Disease Control (of which NIOSH is a part) estimates that HCV-related chronic liver disease results in 8,000 to 10,000 deaths each year. Although the rate of new infection has decreased in recent years, CDC believes that the number of deaths attributable to HCV-related liver disease may substantially increase in the next 10-20 years as the infected

population reaches the age at which complications from chronic liver disease typically occur. As CDC notes, "the course of chronic liver disease is usually insidious, progressing at a slow rate without symptoms or physical signs in the majority of patients during the first two or more decades after infection." *See* http://www.cdc.gov/ncidod/diseases/hepatitis/C_Trainng/edu/3/default.htm. NIOSH has published occupational health guidelines indicating that persons with impaired liver function should not be exposed to toxic substances present in certain workplaces, such as the refinery involved here. *See* http://www.cdc.gov/niosh/chem-inx.html.

The medical profession shares the government's strong interest in protecting the health of the nation's workers by reducing the risk of occupational illness and injury. This interest has led many physicians to specialize in occupational medicine and to the creation of numerous associations dedicated to occupational and environmental medicine. These organizations exist to enhance the profession's ability to prevent workplace injury and illness, as well as to prevent a worker's existing illnesses from being exacerbated by workplace conditions.

Like other medical professionals, occupational medicine physicians follow as a fundamental tenet of their practice the need to protect individual health. The first principle of ACOEM's Code of Ethical Conduct is to "accord the highest priority to the health and safety of individuals in both the workplace and the environment." *See* ACOEM Code of Ethical Conduct, http://www.acoem.org/code/code.htm.

The combined effort of government, medical professionals, employers and employees has resulted in significant progress. The rate of workplace injury and illness

reported for 2000 is the lowest since the Bureau of Labor Statistics began reporting such information in 1973. *See* http://stats.bls.gov/iif/oshwc/osh/os/osnr0013.pdf at 3. According to NIOSH, from 1970 to 1995, the rate of workplace fatalities fell by 78%, and the number of workplace deaths declined by 62%. Similarly, between 1973 and 1994, the rate of occupational injuries and illnesses dropped by 25%. *See* http://www.cdc.gov/niosh/gpran1a.html#bkg.

The Ninth Circuit's ruling that the ADA requires an employer to place a worker in a job that will likely cause significant injury or death to that employee is contrary to the fundamental public policy principles that have guided this progress. The right of individuals to make their own decisions regarding medical treatment and their own safety has never been understood to require that employers — on pain of liability for unlawful discrimination — knowingly contribute to the degradation of an employee's health. The policy judgments in the area of workplace safety have consistently been to the contrary.

Moreover, imposing liability in these circumstances will inevitably weaken the concerted efforts of the government and the medical profession to enhance worker safety and reduce illness and injury on the job. If employers may not deny or limit a person's employment to protect his or her health without being sued under the ADA, employers will have an incentive not to require employees to undergo medical testing and not to seek out competent medical advice from trained professionals regarding potentially deadly health risks. The result will be that work-related illness and injury will increase and workers who wish to be fully informed of the risks they face and to take steps to avoid those risks may be deprived of the full opportunity to do so. There is no basis

for the Ninth Circuit's conclusion that Congress intended such a perverse result that runs so directly contrary to long-standing public policy and the hard-fought progress made in this area.

II. OCCUPATIONAL MEDICINE PHYSICIANS ARE TRAINED AND ETHICALLY OBLIGATED TO RENDER OPINIONS BASED SOLELY ON MEDICAL EVIDENCE.

Permitting employers to decline employment based on medical advice that an applicant's health would be seriously at risk is also consistent with the underlying purpose of the ADA. The ADA prohibits "discrimination" against persons with disabilities. 42 U.S.C. § 12112. Congress was concerned about "purposeful unequal treatment" based on "stereotypic assumptions." 42 U.S.C. § 12101(7). It wanted to bar decisionmaking premised on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, [and] pernicious mythologies." 1 House Comm. On Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 125 (Comm. Print 1991).

An employer that relies on opinions rendered by an occupational medicine physician is not relying on "stereotypic assumptions" or "irrational fears." Both by their training and the ethical principles that govern them, occupational medicine physicians are required to act in the best interest of the individual and on the basis of the best available scientific medical evidence.

ACOEM's Code of Ethical Conduct provides that occupational medicine physicians must "practice on a

scientific basis with integrity." *See* http://www.acoem.org/code/code.htm. The Code likewise requires occupational medicine physicians to "strive to acquire and maintain adequate knowledge and expertise upon which to render professional service." *Id.* The American Medical Association's ethics code similarly provides that physicians performing work-related independent medical examinations must "evaluate objectively the patient's health or disability" and "should not be influenced by the preferences of the patient-employee, employer, or insurance company when making a diagnosis." American Medical Association, Code of Medical Ethics: Current Opinions, E-10.03 Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations, http://www.ama-assn.org/ama/pub/category/2503.html.

Occupational medicine physicians draw upon a variety of resources to enable them to provide this expert, objective care. In addition to basic medical training, at least 35 medical and public health schools around the country offer approved residency programs in occupational medicine. *See* http://www.acoem.org/courses/acgme.htm. Various universities, schools of public health and associations such as ACOEM offer short courses (ranging from several days to one year) and mini-residencies in occupational medicine. The American Board of Preventive Medicine recognizes and certifies qualified physicians in the occupational medicine specialty. Approximately 2,900 physicians have been "board certified" in occupational medicine within the United States. The AMA estimates that about 15,000 physicians in the United States practice either full- or part-time as occupational medicine physicians.

Occupational medicine physicians also have available to them a large body of research, texts, and journals dedicated to occupational medicine issues, including extensive material published by NIOSH and other governmental agencies. Since 1981, ACOEM has published a list of recommended occupational medicine materials, including a core set of reference works. *See* http://www.acoem.org/pubs/reclib.htm#toplist. ACOEM also publishes the Journal of Occupational and Environmental Medicine and co-sponsors each year the American Occupational Health Conference. ACOEM's Code of Ethical Conduct encourages physicians "to strive to expand and disseminate medical knowledge" and to communicate "significant observations and recommendations concerning . . . health or safety." *See* http://www.acoem.org/code/code.htm. ACOEM recently released a formal position statement emphasizing the importance of complying with these provisions to further the health of workers. *See* http://www.acoem.org/paprguid/papers/dissemin.htm.

As result of their training, occupational medicine physicians gain special expertise in the prevention, evaluation, and management of conditions that are either commonly or uniquely experienced by workers or persons exposed to hazardous environmental agents. Of particular value is the expert knowledge occupational medicine physicians possess regarding the particular conditions at a given workplace or the hazards facing employees in a particular industry, such as the petroleum refining industry at issue here. Occupational medicine physicians recognize the importance of understanding an employee's occupational history (in the context of the employee's general health and medical history) and the hazards present on the employee's job when determining whether employment may be causing or exacerbating an illness or injury. William N. Rom, ENVIRONMENTAL AND OCCUPATIONAL MEDICINE 5 (1998).

Amici urge the Court to make clear that employers are entitled to rely upon the expert advice they receive from trained medical practitioners regarding workplace hazards, including threats to an employee's own health arising from illnesses specific to that employee.

III. EMPLOYERS SHOULD BE PERMITTED TO RELY UPON THE MEDICAL OPINIONS REASONABLY AVAILABLE TO THEM AT THE TIME THE EMPLOYMENT DECISION IS MADE.

The EEOC's regulations provide that whether an employee poses a "direct threat" requires an "individualized assessment" based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Amici believe that this standard must be applied in a manner that permits employers to rely on the opinions of physicians available at the time the employment decision is made, so long as there is nothing about the opinions or the attendant circumstances that would render them suspect. An employer should not be required, on pain of being held liable for violating the ADA, to second-guess the facially reasonable opinions of competent physicians or to conduct its own full trial of the relevant medical issues each time it is required to assess whether an employee is qualified or poses a "direct threat."

The district court found that Chevron properly relied upon the medical opinions available to it in concluding that Echazabal's health would be endangered if he were employed in the refinery.[2] In doing so, the court recognized that the focus

2. This case does not involve any question whether plaintiff was entitled to a reasonable accommodation, as plaintiff did not raise that issue in the courts below.

must be on the information available to the employer at the time the employment decision is made and that the employer cannot be held liable for violating the ADA based on allegedly contrary, after-the-fact medical opinions presented only in later litigation.

The district court's ruling is consistent with the decisions of other lower courts on this issue. For example, in *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996), the Seventh Circuit ruled that the defendant university properly relied on the unanimous medical opinions available to it at the time in finding that plaintiff faced a serious risk of substantial harm, even though conflicting medical opinions were later introduced at trial. The court reasoned:

> We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts — neutral arbiters but generally less skilled in medicine than the experts involved — should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence.

101 F.3d at 485.

Similarly, in *Walker v. Attorney General*, 572 F. Supp. 100 (D.D.C. 1983), the court held that the FBI acted properly in relying upon the diagnosis of the plaintiff's own physician, which was confirmed by an examination at the Naval Medical

Center, even though it was later determined that these diagnoses were erroneous. *Id.* at 101-02. The court concluded that the employer cannot be found to have engaged in discrimination "where the only facts before the employer establish without contradiction that plaintiff is not 'otherwise qualified.' " *Id.* at 102. Likewise, *Bento v. I.T.O. Corp.*, 599 F. Supp. 731 (D.R.I. 1984), held that the employer properly found an employee not to be otherwise qualified where all available medical opinions showed him unfit to work, even though the employee offered contrary opinion at the time of trial:

> An employer in such circumstances may surely be required to assess the nature and extent of an employee's disability in reasonable and realistic terms. Once this is done, however, the assessment itself need not reach a medically unassailable conclusion; the law does not demand either omniscience or deuteroscopy.

Id. at 744-45; *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 807-08 (6th Cir. 1998) (employer "made a reasonably informed and considered decision" based on "medically informed opinions of those with knowledge," including employee's treating physician); *Chiari v. City of League City*, 920 F.2d 311, 316, 317 (5th Cir. 1991) (employer properly relied on medical opinions of two employer-retained physicians, which were agreed with by employee's physician); *Pahulu v. University of Kansas*, 897 F. Supp. 1387, 1394 (D. Kan. 1995) (despite conflicting medical evidence at trial, court found that employer's decision "has a rational and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment").

The district court's ruling here is also consistent with the decisions of this Court. In recognizing the propriety of a "direct threat" defense in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Court emphasized the need for an "individualized inquiry" to prevent "deprivations based on prejudice, stereotypes, or unfounded fear." *Id.* at 287. These concerns are fully satisfied when an employer relies on facially reasonable and uncontradicted opinions rendered by physicians trained in occupational medicine who have examined the prospective employee.

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court held that, where the defendant was himself a medical professional, the defendant's own conclusion that a significant risk of harm existed was not entitled to any special deference. *Id.* at 649. The defendant was instead obligated to "assess the risk . . . based on the objective, scientific evidence available to him and others in his profession" and his opinion was required to meet a standard of "objective reasonableness." *Id.* at 649-50. When the defendant is not a medical practitioner, and thus is not in a position to itself independently evaluate the medical evidence, the defendant fulfills this duty to "assess the risk" when it consults trained medical professionals and receives their uniform advice that a significant risk of harm exists. As the Court recognized, "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person" whose action is being challenged. *Id.* at 649. From the standpoint of a lay employer, the employer has done all that it can reasonably be expected to do to "assess the risk . . . based on the objective, scientific evidence available" to it when it obtains facially reasonable individualized opinions from physicians whose competence it has no reason to doubt.

The district court's decision is also consistent with the basic purpose of the ADA to prevent discrimination based on "stereotypic assumptions." 42 U.S.C. § 12101(7). An employer's decision not to hire an applicant does not become unlawful discrimination based on "stereotypic assumptions" merely because the applicant later produces medical opinions that allegedly conflict with the uncontradicted expert diagnoses available to the employer at the time it made its decision. Subjecting an employer to liability under the ADA (including for substantial monetary remedies and attorneys' fees) based on a post hoc introduction of evidence not made available to the employer at the time it was required to act would be patently unfair and would not further any legitimate purpose.

Nor should an employer's liability turn on a *de novo* reevaluation in court of the expert medical evidence upon which the employer relied. Such a rule would take the assessment of medical risk out of the hands of physicians with the training and expertise to evaluate such risk and relegate it instead to the vagaries of the litigation process, to be decided after-the-fact by a judge or jury with no such expertise. The employer would be put in the position of second-guessing the diagnoses it receives and declining to follow them for fear that a judge or jury might later disagree. Amici believe that this result would undermine the ability of physicians to carry out their critical function of independently evaluating their patients' health risks and rendering their expert opinion in the best interest of the patient.

Permitting an employer to rely on contemporaneously available and facially reasonable medical opinions does not leave employees powerless against mistaken diagnoses. If the diagnosis is based on erroneous or incomplete information, the employee remains free to present the correct information to the

physicians who examined him. The employee is also free to contemporaneously seek the opinions of other specialists and to provide that information to the employer, thus provoking a dialogue with the employer and the original examining physicians that might result in agreement that no significant risk of substantial harm exists. The applicable rule here should be drawn in such a way that gives the employee the incentive to seek out and present relevant medical evidence at the time the decision is made — not months or years after-the-fact in the context of burdensome and expensive litigation.

Similarly, to the extent the relevant medical evidence becomes available only after the decision is made, the employee is free to present it to the employer at that time. Should the employer unreasonably persist in an adverse employment decision after receiving information that would make clear to a lay person that the earlier diagnoses were incorrect, liability under the ADA might be proper. But such liability would be imposed for the later adverse action, not for the original decision. *See Bento*, 599 F. Supp. at 744 n.15 (employer could not be held liable based on previously unavailable testimony rendered at trial that plaintiff was fit for work, but such testimony prospectively put employer on notice of plaintiff's fitness should plaintiff re-apply).

Employees are also protected in the event the employer's reliance on medical opinion is not justifiable. In *Lowe v. Alabama Power Co.*, 244 F.3d 1305 (11th Cir. 2001), for example, the court denied summary judgment to the employer because the medical opinion on which the employer relied was not based on a "timely, particularized assessment" of the plaintiff's capabilities. *Id.* at 1306. The physician had performed only one "cursory" examination of the plaintiff

seventeen months before the employment decision at issue and had restricted the plaintiff on an "assumption that all double amputees have the same limitation." *Id.* at 1309; *see also Dipol v. New York City Transit Authority*, 999 F. Supp. 309, 316 (E.D.N.Y. 1998) (employer's reliance not justifiable where physicians had not "performed an individualized assessment of plaintiff's condition").

But where an employer obtains facially reasonable medical opinions based on an individualized assessment by competent medical professionals, no legitimate purpose is served by subjecting the employer to litigation and potential liability for relying on such opinions. As the medical practitioners who render such opinions in compliance with their ethical obligation to provide objective evaluations and to protect individual health, amici urge the Court to make clear that employers may rely on such opinions without fear of later being found to have violated the ADA for having done so.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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